Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JANET GREENWELL,

Petitioner,

v.

AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER NEGLIGENCE CAUSING THE INITIAL AGGRAVATION OR RECURRENCE OF AN INJURY OR ILLNESS SUSTAINED IN THE SERVICE OF THE SHIP IS REQUIRED FOR THE OPERATIONAL ACTIVITY DOCTRINE TO IMPUTE NEGLIGENCE ON A JONES ACT EMPLOYER FOR THE NEGLIGENCE OF A DOCTOR IT SELECTS TO ADMINISTER CURE?

II. ALTERNATIVELY, WHETHER THE OPERATIONAL ACTIVITY DOCTRINE IMPUTED NEGLIGENCE ON A JONES ACT EMPLOYER FOR THE NEGLIGENCE OF A DOCTOR IT SELECTS TO ADMINISTER MEDICAL TREATMENT TO A CREWMEMBER FOR A NON-WORK RELATED MEDICAL CONDITION?

LIST OF PARTIES

Petitioner Janet Greenwell filed a lawsuit against Respondent Aztar Indiana Gaming Corporation, d/b/a Aztar Casino, and Respondent Aztar brought a third-party action versus Drs. Matthew B. Kern, M.D. and Gregory J. Loomis, M.D. Therefore, Drs. Kern and Loomis are also being served as Respondents.

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Petitioner Plaintiff, Janet Greenwell ("Petitioner") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

1. The district court's *sua sponte* dismissal of Petitioner Jones Act/malpractice cause of action on September 21, 2000 is reproduced at App. B.

2. The opinion of the Seventh Circuit is reported at 268 F.3d 486 (7th Cir. 2001) and is reproduced at App. A.

3. The November 16, 2001, Order denying Petitioner's Petition for Rehearing and/or Rehearing En Banc, is reproduced at App. C.

STATEMENT OF JURISDICTION

The Seventh Circuit's Judgment was entered on October 4, 2001, and the Order denying Petitioner's Petition for Rehearing and/or Rehearing En Banc was entered on November 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Jones Act, 46 U.S.C. App. § 688 provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes

> of the United States, modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court in which the defendant employer resides or in which his principle office is located.

INTRODUCTION

At issue in this case is whether the operational activity doctrine (the "Doctrine") – holding a seaman's employer liable for the negligence of a third party performing operational activities of the employer – applies to an employer's obligation to provide cure, even if the underlying injury or illness incurred in the service of the ship is not alleged to be negligently caused, and is an aggravation or recurrence of a prior condition, or, alternatively, whether a valid claim exists under the Jones Act for damages caused by the negligence of a physician selected by the shipowner to treat a crewmember ailing from a non-work related condition.

In its October 4, 2001 Opinion, the Seventh Circuit refused to apply the Doctrine to an employer's cure obligation, despite the Respondent employer having selected the allegedly negligent physician. Also, the Respondent employer admitted that its payment to the offending physician

was made pursuant to its cure obligation owing the Petitioner. The Seventh Circuit premised its holding on the fact that Petitioner testified that she had previous back problems, and had amended her complaint to voluntarily dismiss her claim that the Respondent employer's negligence caused the underlying slip and/or trip at work for which Respondent thereafter selected the physicians for treatment.

Supreme Court review is warranted as the Seventh Circuit's opinion conflicts not only with established precedent in the Seventh Circuit, but also of this Court, i.e. *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, *rehearing denied*, 356 U.S. 978 (1958); *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *Farrell v. United States*, 336 U.S. 511(1949).

Moreover, the Doctrine is the subject of another Petition for a Writ of Certiorari before this Court in *Diamond Jo Casino v. Rannals*, No. 01-876. Should this Court grant Certiorari in that case, it is respectfully submitted those appeals should be consolidated.

STATEMENT OF THE CASE

A. FACTS UNDERLYING LAWSUIT

In 1997, Petitioner Plaintiff was employed by the Respondent employer as a crewmember on its vessel, the CITY OF EVANSVILLE. In June, 1997, Petitioner suffered an injury in the service of the ship, to her back, aggravating or causing a recurrence of a preexisting condition, and was thereafter diagnosed with having a 50 percent slippage of

her L5 vertebrae over S1 (a condition called Grade II spondylolisthesis) and a degenerated and bulging/herniated disc at that level.

The Respondent employer forced Petitioner to treat with physicians of Respondent employer's choosing and required her to sign a document indicating that she was required to see Respondent's chosen doctors or she would be responsible for the medical bills herself. Searching for a rationale to support this result, Judge Posner's statement that the Respondent employer merely "referred" Petitioner to the doctor grossly understates the proposition. Thereafter, the Respondent employer's chosen doctors, Loomis and Kern, recommended Greenwell undergo surgery to fuse the L5-S1 disc. When Petitioner Greenwell requested treatment and/or a second opinion from another neurosurgeon in the area, the Respondent employer refused the request. Thereafter, Drs. Loomis and Kern performed the surgery but at the wrong level (L4-5) and thus failed to achieve the necessary fusion.

Respondent having paid for the offending surgery pursuant to its cure obligation: its Claim Manager stated in an affidavit that:

> "From June 17, 1997, until July 1998, Aztar paid [Petitioner] Greenwell a total of . . . $49,962.16 *in cure* (payment of medical expenses) for treatment for her low back *including her surgical fusion at L5-S1*. . . ."

(Emphasis added) (Affidavit of Aztar's claims manager). Nevertheless, the Seventh Circuit refused to acknowledge application of the Operational Activity Doctrine.

B. PROCEDURAL HISTORY IN DISTRICT COURT

Because of the negligence of the Respondent employer's chosen doctors and its fraud and false representations as to what doctors Greenwell could and could not treat with, the First Amended Complaint against Respondent alleged Malpractice (Count II), Fraud (Count III) and Negligent Representation (Count IV). The Malpractice count alleges:

> 5. Defendant selected Dr. Matthew B. Kern and Gregory J. Loomis to treat Plaintiff, with the former assuming primary care for the operative procedure performed on or about August 18, 1997, whereby in the process thereof, in breach of the applicable standard of care, said physician(s) did perform surgical procedures at the wrong level (L4-5) as opposed to L5-S1, resulting in instability and slippage of the spine; moreover, prior thereto, the standard of care was breached in said physician(s) not requiring that Plaintiff stop smoking prior to the surgical procedure and to test for same *via* appropriate screening.

Upon leave to file the First Amended Complaint being granted, in promotion of litigational efficiency and economy, Petitioner voluntarily dismissed Count I (paragraph 4 only) of the Complaint which alleged that the Respondent employer negligently caused the injuries of June 17, 1997 and August 14, 1997, incurred in the service of the ship, that then led to the negligent treatment referenced in Paragraph 5 of the First Amended Complaint.

Thereafter, the Respondent employer filed a Third-Party Complaint against Drs. Loomis and Kerns seeking contribution and/or indemnity. Drs. Loomis and Kern filed motions to dismiss on the grounds that the district court did not have jurisdiction over the Respondent employer's third party claims and that those third party claims were somehow premature because the Indiana Medical Malpractice Act required that the claims must first be reviewed by a medical review panel.

On September 21, 2000, the district court granted Third-Party Defendants Loomis and Kerns motion and *sua sponte* dismissed Count II (malpractice) of the First Amended Complaint without prejudice erroneously based on a claim of lack of supplemental jurisdiction. App. B. These decisions were then appealed to the Seventh Circuit by the Respondent employer and Petitioner.

C. PROCEEDINGS IN SEVENTH CIRCUIT

On November 8, 2000 the Seventh Circuit consolidated the two appeals and set a briefing schedule that did not allow for Petitioner filing a Reply Brief. In its opening Brief [filed after the extension], the Respondent employer never addressed the *sua sponte* dismissal of Petitioner's Jones Act/ malpractice claim. Petitioner's Brief on Appeal addressed the district court's erroneous holding that it did not have original jurisdiction over the case because Petitioner did not follow the Indiana State Medical Malpractice Act. Petitioner prevailed on that issue in the Seventh Circuit. The Respondent employer's Reply Brief [filed after extension on July 19, 2001], responded to Petitioner's opening Brief by raising new issues and matters.

The Seventh Circuit's briefing schedule order not having provided for reply brief by Petitioner, she consequently filed a Motion for Leave to File a Reply Brief which the Seventh Circuit inexplicably denied. The Seventh Circuit Decision of October 4, 2001, adopted the Respondent employer's arguments in its Reply Brief which Petitioner Greenwell was precluded from responding to. Thus, Petitioner lost in both the district and circuit courts without ever having a chance to address the prevailing rationales.

Pertinent to this Writ of Certiorari, Judge Posner wrote:

> Had Greenwell's back pain been caused by an injury sustained at work, as she originally charged, and had the malpractice in treating her been committed by a doctor employed by Aztar, her employer, Aztar would have been liable in accordance with standard principles of respondeat superior. It would have been liable under both the Jones Act and the doctrine of maintenance and cure, because the malpractice would have been committed by a fellow employee acting within the scope of his employment. *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665-69 (1943); *Fitzgerald v. A.L. Burbank & Co.*, *supra*, 451 F.2d at 679-80. Even if the doctor had been an independent contractor hired by Aztar to discharge the "cure" part of Aztar's duty of maintenance and cure, rather than an employee, Aztar would have been liable, as explained in *Id.* at 680. But after admitting in her deposition that she had been seeing a chiropractor about her back before experiencing back pain onboard the ship, she amended her complaint to drop the

> charge that she had been injured at work and charged instead that Aztar had either directed her to use the incompetent doctors who operated on her or had fraudulently induced or otherwise improperly compelled her to use them. . . .

App. A, pp. 3a-4a.

> Remember that Greenwell initially charged that she had been injured at work. That would have brought the case within range, at least, of the doctrine of maintenance and cure. When she dropped that charge, her claim of maintenance and cure evaporated, because the duty of cure is limited to injuries and illnesses that occur on the job. But it evaporated because of a failure of proof, not because of a failure of jurisdiction.

App. A, p. 9a.

> As for Greenwell's claim under the Jones Act, a claim within the federal-question jurisdiction of the district court, it too evaporated because of facts that emerged after the complaint was filed: that the doctors who operated on her were neither employees of the Defendant nor acting on behalf of Aztar, thus eliminating any basis for vicarious liability, and that Aztar was not negligent in selecting them, thus eliminating any basis for holding it directly liable for the consequences of the operation on Greenwell's back. More fundamentally, the Jones Act, like the doctrine of maintenance and cure, *Braen v. Pfeiffer Oil Transportation Co.*, 361 U.S. 129, 132-33 (1959),

> is limited to injuries that occur "in the course of [the seaman's] employment."

46 U.S.C. App. § 688(a) and Greenwell did not, App. A, p. 9a.

Petitioner did not disavow or drop the allegations that this action was given rise to in the service of a ship (allegation 3, First Amended Complaint); she only dropped the charge of shipboard negligence. Defendant admitted that it paid for the negligent surgery as part of its cure obligation. Since the surgery had been paid for as cure by the Respondent employer, there was no viable claim for that cure but did not negate that the injury or illness had been sustained in the service of the ship.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S UNPRECEDENTED OPINION MAKES A SEAMAN'S ENTITLEMENT TO MAINTENANCE AND CURE CONDITIONAL UPON A FINDING OF NEGLIGENCE AND/OR "NEW" INJURIES, AS OPPOSED TO AGGRAVATION OR RECURRENCE OF INJURIES THAT OCCUR IN THE SERVICE OF THE SHIP; THUS REPUDIATING YEARS OF PRECEDENT AND THE WHOLE PURPOSE OF MAINTENANCE AND CURE.

A. CURE IS PAYABLE FOR INJURIES OR ILLNESSES SUSTAINED IN THE SERVICE OF THE SHIP.

"Cure" involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman until the point of "maximum cure." *Pelotto v. L & N Towing, Co.*, 604 F.2d 396, 400 (5th Cir. 1979). Such duty arises from the seaman's disability, not from the fault of either party. *Petition of Atlass*, 350 F.2d 592, 595 (7th Cir. 1965). A maintenance and cure claim is separate from a Jones Act claim. *West v. Midland Enterprises, Inc.*, 227 F.3d 613, 616 (6th Cir. 2000); *Smith v. Lykes Brothers-Ripley S.S. Co.*, 105 F.2d 604, 606 (5th Cir. 1939) and arises from the context of the employment relationship, and not from any negligence or fault on the part of the vessel. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938).

A shipowner's obligation to pay maintenance and cure stems from two basic policy concerns recognized by maritime

law for hundreds of years, i.e. (1) the well being of seamen aboard ship and in foreign ports, and (2) the importance of a capable merchant marine to the economic and military security of a nation. See Martin J. Norris, *The Law of Seamen*, Sec. 26:4 (1985); *See also Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975) (stating that the duty to pay maintenance and cure encourages maritime commerce and assures the well being of seamen). It has been explained to be "[a]mong the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors . . ." . *Hughes v. Hunter Marine Transport, Inc.*, 1998 A.M.C. 6,7 (M.D. Tenn. 1997). Seamen rely on it as an alternative to workers' compensation. *Blainey v. American Steamship Co.*, 990 F.2d 885, 886 (6th Cir. 1993).

Contrary to the underlying rationale of Judge Posner , this obligation to pay cure is not contingent upon a "new" or fault related injury occurring while working on a vessel but can arise out of a prior medical condition or illness that recurs, *Breese v. AWI, Inc.*, 823 F.2d 100 (5th Cir. 1987); *Sammon v. Central Gulf S.S. Corp.*, 442 F.2d 1028 (2d Cir. 1971) or that is aggravated in the service of the ship. *Smith v. Apex Towing Co.*, 949 F. Supp. 667, 671 (N.D. Ill. 1997).

B. CURE IS NOT CONTINGENT UPON NEGLIGENCE.

Fault causing the underlying injury is not required for the employer to be obligated to pay cure, *Sulentich v. Interlake Steamship Co.*, 257, F.2d 316, 320 (7th Cir. 1985), nor is it required for application of the operational activity doctrine *sans* maintenance and cure. *Mangrum v. Union Pacific Railroad Co.*, 120 Cal. App. 2nd 960, 978, 41 Cal.

Rptr. 536, 548, 16 ALR 3rd 543 (Dt. Ct. App. 1964). For example, in *Rowald v. Cargo Carriers, Inc.*, 243 F. Supp. 629 (E.D. Mo. 1965), the court, in deciding whether defendant was liable for maintenance and cure benefits, held as follows:

> While the instant disability of libelant is unrelated to and not caused by his employment, it manifested itself first while he was employed on a 30 day off period but still a member of the crew. Applying the principles of *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938) and *Farrell v. United States*, 336 U.S. 1949, this court finds the respondent is responsible for maintenance and cure under these circumstances.

Contrary to the Seventh Circuit decision in this case, Petitioner's voluntary dismissal of Count I (negligence causing slip, and trip) did not drop the charge that she sustained an injury in the service of the ship (Allegation 3, First Amended Complaint) or somehow undercut the malpractice alleged in Count II. Judge Posner erroneously read too much into the voluntary dismissal of Count I and without record support, impermissibly reasoned that Petitioner Greenwell dismissed Count I because a pre-existing condition was involved. Damages for aggravation of an underlying condition, however, are recoverable under the Jones Act. *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 601 (1st Cir. 1996). Dismissal of Count I did not disavow that the aggravation or recurrence of Petitioner's back condition that necessitated surgery occurred in the service of the ship or that the Respondent employer remained liable under the

Operational Activity Doctrine for the medical treatment Defendant selected for Petitioner ostensibly pursuant to its cure obligation.

C. FAILURE TO APPLY THE OPERATIONAL ACTIVITY DOCTRINE EVISCERATES CLEAR SEVENTH CIRCUIT AND SUPREME COURT PRECEDENT.

In *Hopson v. Texaco*, 383 U.S. 262 (1966), this Court undertook to adjust the expense of injury equitably between the worker and employer. The Court also stated that justice demands that one who gives his labor to the furtherance of the enterprise should be assured that *all* combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered, and gave an accommodating scope to the word "agents". *Id.* at 264.

Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932) long ago held that a shipowner is liable in tort for failing to provide a seaman "proper and adequate" medical attention and equates such a failure to a failure to rescue a seaman who has "fallen into the sea." *Id.* at 377; *see also DeZon v. American President Lines, Ltd.*, 318 U.S. 660 (1943). This duty extends to shoreside physicians selected by the employer, see *Central Gulf S.S. Corp. v. Sambula*, 405 F.2d 291 (C.A. Tex. 1968) and its progeny.

In *Fulk v. Illinois Cent. R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994), the Seventh Circuit correctly found it to be established law that "[o]nce an employer undertakes to provide medical attention it must do so in a non-negligent manner", and that an employer selected doctor was an agent.

Id. at n.3.[1] Federal courts have consistently recognized that principle, which is based on the operational activity doctrine described in *Hopson*, *supra*; *Central Gulf S.S. Corp. v. Sambula*, *supra* at 302; *See also Rannals v. Diamond Jo Casino*, 265 F.3d 442, (6th Cir. 2001) (Petition for Certiorari pending); *Fletcher v. Union Pacific R. Co.*, 621 F.2d 902, 909 (8th Cir. 1980).

Operational activity "has a broad meaning", applying to activities that are "characteristic to the business." *Austin v. Soo Line Railroad Co.*, 1996 W.L. 539123 *3 (N.D. Ill. 1986). An accommodating scope must be given to the term "agent". *Schroeder v. Pennsylvania Railroad Company*, 397 F.2d 452, 458 (7th Cir. 1968).

Here, Petitioner Greenwell alleged [and testified] that Respondent employer told her that it had "the right to determine the place of medical treatment", and "selected Dr. Matthew B. Kern" who negligently performed surgery, First Amended Complaint allegations 5-7. " '[I]t would violate the notions of fair play for [an employer] to encourage its employees to [perform a particular activity away from its premises] and then escape liability for injuries suffered by its workers as a result of the poor quality of the facilities it encouraged them to use." *Rannals v. Diamond Jo Casino*, *supra*, 265 F.3d at 449.

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1. *Fulk* involved a railroad employee who had a pre-existing condition (high blood pressure), who suffered a fatal ventricular erythema while on the job and argued that the employer had a duty to compel him to submit to further medical treatments after it ordered a pre-employment physical conducted by his private physician. While acknowledging the established law aforesaid, the Seventh Circuit rightfully refused to extend the duty to require an employer to oversee an employee's compliance with doctor's orders. Here, likewise, we have a pre-existing condition that worsened on the job, *but*, it was the medical treatment itself that was deficient.

1. In Selecting Dr. Kern To Discharge Defendant's Cure Obligation, Respondent Employer Was Engaged In An Operational Activity, i.e., The Payment Of Cure.

Respondent's claims manager swore that:

> From June 17, 1997, until July 1998, Aztar paid [Petitioner] Greenwell a total of . . . $49,962.16 in cure (payment of medical expenses) for treatment for her low back including her surgical fusion at L5-S1 . . .

(Affidavit of Aztar's claims manager).

While failing to acknowledge that affidavit's attestation to the fact that the allegedly negligent treatment was obviously committed as part of Respondent employer's discharge of its cure obligation, Judge Posner nevertheless stated that "if the doctor had been an independent contractor hired by Aztar to discharge the 'cure' part of Aztar's duty of maintenance and cure, . . . Aztar would have been liable . . . .". As demonstrated by the above referenced affidavit however, *the only evidence before the Seventh Circuit was that Dr. Kern was an independent doctor hired by Respondent to discharge its cure obligation*!

2. Keeping A Crew Healthy Is An Operational Activity.

Even if Dr. Kern had been selected by Respondent employer to treat a non-work related condition, Respondent's liability would still fall within the Doctrine. In *Mangrum v. Union Pacific Railroad Co., supra*, a railway employee –

not covered by maintenance and cure – became ill during the course of his employment. The employer selected a doctor who misdiagnosed bronchitis. The plaintiff employee later died from pneumonia, and an FELA action was commenced alleging malpractice/misdiagnosis. An on-the-job injury caused by negligence did not cause the underlying misdiagnosed condition. The Court, nevertheless, found that the employer selected doctor was performing an operational activity on behalf of the railroad because "a railroad cannot operate properly without a full healthy crew aboard a train". *Id.*, at 230 Cal. App. 2nd 978. Here, Petitioner's back pain arose in the course of her employment on the vessel and the Respondent employer selected the doctor who committed the malpractice. The Respondent employer cannot operate without a full healthy crew aboard. Thus, the doctor selected by the Respondent employer was performing an operational activity in trying to make the Petitioner healthy.

II.

THE SCOPE OF APPLICATION OF THE OPERATIONAL ACTIVITY DOCTRINE IS INVOLVED IN A PETITION FOR CERTIORARI IN DIAMOND JO CASINO V DAWN RANNALS, NO. 01-876; THIS CASE SHOULD PROCEED AS A COMPANION CASE.

Supreme Court Rule 27(3) states, "The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe." In this case, the main issue to be decided by this Court is the scope of application of the Operational Activity Doctrine. This very same issue is pending on a Writ of Certiorari in the case of *Diamond Jo Casino v. Rannals*,

No. 01-876, a case in which the plaintiff respondent prevailed in the Sixth Circuit under the Operational Activity Doctrine as it applied to a maritime employer's liability for accidents which occurred at safety training courses conducted by the Department of Transportation and United States Coast Guard. As both cases involve the scope of application of the same Doctrine, Plaintiff requests they proceed as companion cases should Writs of Certiorari be granted for a more full delineation of the intended application of the Doctrine.

CONCLUSION

A maritime employer's duty to provide cure to injured or ill seamen is part of that employer's operational activities and encourages maritime commerce and assures the well-being of seamen. By refusing to acknowledge the application of this doctrine in the absence of negligence or simply because a seaman's injury was pre-existing is contrary to the entire rationale behind a maritime employer's obligation to provide cure and existing Supreme Court and Seventh Circuit precedent. For all the foregoing reasons, Petitioner Greenwell respectfully requests her Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 4, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3753 and 00-3879

JANET GREENWELL,
Plaintiff, Cross-Appellant,

v.

AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino,

Defendant, Third-Party Plaintiff/Appellant, Cross-Appellant,

v.

MATTHEW B. KERN and GREGORY J. LOOMIS,

Third-Party Defendants/Appellees.

Appeals from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 98 C 211 — **Richard L. Young**, *Judge*

ARGUED JUNE 6, 2001 — DECIDED OCTOBER 4, 2001

Appendix A

POSNER, *Circuit Judge*. We have a three-cornered dispute that raises a tangle of jurisdictional and procedural issues. The plaintiff, Greenwell, suffered back pain while walking in a casino boat on which she was employed by the owner, Aztar. (On the origins and popularity of modern riverboat gambling, see Lori Chapman, "Riverboat Gambling in the Great Lakes Region: A Pot of Gold at the End of the Rainbow or Merely 'Fool's Gold?,' " 26 *U. Toledo L. Rev.* 387, 390-91 (1995); Ronald J. Rychlak, "The Introduction of Casino Gambling: Public Policy and the Law," 64 *Miss. L.J.* 291, 309 (1995).) The boat was afloat on a navigable waterway of the United States in Indiana. Aztar referred Greenwell to two doctors, Kern and Loomis, who operated on her back — negligently, she claims. Yet her suit, which charges both a work-related injury to her back and medical malpractice and related torts in the treatment of the injury, is not against the doctors but against Aztar. Aztar, however has impleaded the doctors, contending that they are the primary wrongdoers.

Greenwell bases federal jurisdiction primarily on the Jones Act, which applies the principles of the FELA to maritime workers, 46 U.S.C. App. § 688(a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 877 (7th Cir. 2001); *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 266 (2d Cir. 1963), and on the admiralty doctrine of maintenance and cure, which requires a seaman's employer to provide food, lodging, and — what is relevant here — medical services to a seaman injured while employed on the ship. *Lewis v. Lewis & Clark Marine, Inc.*, 121 S.Ct. 993, 997 (2001); *Galveston County Navigation District No. 1 v.*

Hopson Towing Co., 92 F.3d 353, 357 n. 8 (5th Cir. 1996); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971). The seaman is unlikely to have an alternative source of maintenance and cure when at sea; the doctrine thus formalizes and makes mandatory what, in its absence, would probably be a contractual undertaking by the employer. Cf. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943); *Silmon v. Can Do II, Inc.*, 89 F.3d 240, 242 (5th Cir. 1996). The duty is nonwaivable, perhaps out of fear of duress against seamen who are injured, or fall sick, far from land, and so are at the mercy of their employer.

Had Greenwell's back pain been caused by an injury sustained at work, as she originally charged, and had the malpractice in treating her been committed by a doctor employed by Aztar, her employer, Aztar would have been liable in accordance with standard principles of respondeat superior. It would have been liable under both the Jones Act and the doctrine of maintenance and cure, because the malpractice would have been committed by a fellow employee acting within the scope of his employment. *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665-69 (1943); *Fitzgerald v. A.L. Burbank & Co.*, *supra*, 451 F.2d at 679-80. Even if the doctor had been an independent contractor hired by Aztar to discharge the "cure" part of Aztar's duty of maintenance and cure, rather than an employee, Aztar would have been liable, as explained in *id.* at 680. But after admitting in her deposition that she had been seeing a chiropractor about her back before experiencing back pain on board the ship, Greenwell amended her complaint to drop the charge that she had been injured at work and charged instead that Aztar had either directed her

to use the incompetent doctors who operated on her or had fraudulently induced or otherwise improperly compelled her to use them. Under standard tort principles (see, e.g., *Reed v. Bascon*, 530 N.E.2d 417, 420-21 (Ill. 1988)) that are equally applicable to maritime cases, Aztar would be liable, not vicariously but as a negligent actor, if it steered Greenwell to doctors who it knew or should have known were incompetent. *Fitzgerald v. A.L. Burbank & Co.*, *supra*, 451 F.2d at 679; cf. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988).

That's a big "if." Steering a patient to a doctor who commits malpractice is not itself malpractice or otherwise tortious unless the steerer believes or should realize that the doctor is substandard, and that is not claimed. Yet the district judge, instead of dismissing the malpractice claim on the merits and therefore with prejudice, dismissed it without prejudice. He thought it merely premature, because Greenwell hadn't completed the pre- complaint review procedure to which Indiana subjects claims of medical malpractice. Ind. Code § 34-18-8-4; *Hill v. Porter Memorial Hospital*, 90 F.3d 220, 222 (7th Cir. 1996); *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880, 884 (Ind. App. 2001). The judge also dismissed Aztar's third-party claim against the doctors.

Both dismissals are interlocutory, because the remainder of Greenwell's complaint, consisting of fraud claims against Aztar that invoke the district court's supplemental jurisdiction, 28 U.S.C. § 1367, remains pending in the district court. The general rule in the federal system is that only final judgments are appealable. 28 U.S.C. § 1291. The judge purported to make the dismissals appealable by entering

partial final judgments under Fed. R. Civ. P. 54(b). This was improper with respect to the dismissal of Greenwell's claims. Rule 54(b) can be used only to enter judgment "as to one or more but fewer than all of the claims or parties," with "claim" defined to include all legal grounds that are based on closely related facts. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 860 F.2d 1441, 1444 (7th Cir. 1988). The retained fraud claims overlap the dismissed claims too closely to satisfy this criterion. In contrast, the dismissal of the third-party claim let the doctors out of the case, thus satisfying the "fewer than all of the . . . parties" provision of Rule 54(b) and making that dismissal a final, immediately appealable judgment. So their appeal is secure.

Now it is true that interlocutory appeals are authorized in admiralty cases by 28 U.S.C. § 1292(a)(3), but this route isn't open to Greenwell either, and for two reasons. First, as we'll see, Greenwell failed to invoke admiralty procedures, *Continental Casualty Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 517 (7th Cir. 1999), and second, the only interlocutory appeals that fall within section 1292(a)(3) are those that "determin[e] the rights and liabilities of the parties." This language has been interpreted to exclude procedural orders, *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 668-70 (7th Cir. 1999) (per curiam); *Sea Lane Bahamas Ltd. v. Europa Cruises Corp.*, 188 F.3d 1317, 1321-22 (11th Cir. 1999), such as the order in this case dismissing Greenwell's claim for failure to exhaust administrative remedies. It's a sensible interpretation. A rule allowing all interlocutory orders to be immediately appealable would flood us with appeals. Anyway the purpose of the special admiralty appeal statute is merely to allow the determination

of liability to be appealed without awaiting the determination of damages, *Beluga Holding, Ltd. v. Commerce Capital Corp.*, 212 F.3d 1199, 1203 (11th Cir. 2000), consistent with the historic admiralty practice (now of course widely imitated in ordinary civil cases as well) of trying liability and damages separately. *Wingerter v. Chester Quarry Co.*, *supra*, 185 F.3d at 670.

That leaves only one route for Greenwell's appeal: the doctrine of pendent appellate jurisdiction. The dismissal of Aztar's third-party complaint against the doctors is appealable by virtue of Fed. R. Civ. P. 54(b), as we have said, and Greenwell's appeal is closely related to it. But after the Supreme Court questioned the existence of the doctrine in *Swint v. Chambers County Commission*, 514 U.S. 35, 43-51 (1995), we turned skittish, describing it as a "controversial and embattled doctrine" in *United States v. Board of School Commissioners*, 128 F.3d 507, 510 (7th Cir. 1997), and invoking it not once in the six years after *Swint* was decided. Yet the doctrine clearly still lives, for it has been invoked by the Supreme Court since *Swint*, in *Clinton v. Jones*, 520 U.S. 681, 707 n. 41 (1997), where the Court said that "the Court of Appeals correctly found that pendent appellate jurisdiction over this issue was proper." Cf. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 770 n. 2 (2000). It has also been invoked by our sister circuits. See *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes*, No. 00-40088, 2001 WL 902139, at *3 (5th Cir. Aug. 27, 2001); *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001); *In re Stoltz*, 197 F.3d 625, 629 (2d Cir. 1999); *Twelve John Does v. District of Columbia*, 117 F.3d 571, 574-75

(D.C. Cir. 1997). This is an apt case for the use of the doctrine. Greenwell's malpractice claim against Aztar is entwined with Aztar's indemnity claim against the doctors (Greenwell is trying to hold Aztar liable for the doctors' acts, and indemnity depends on whether she succeeds), and since we must decide the latter, we might as well decide the former at the same time and head off a second appeal — so this is one of those cases in which allowing an interlocutory appeal prevents rather than produces piecemeal appeals, while if the liability and indemnity issues did not overlap there would be only a limited economy from deciding them in one rather than two appeals. And though the special admiralty appeal statute is not applicable, it reflects a relaxed view of finality hospitable to a doctrine that enables certain interlocutory orders to be brought up to the court of appeals earlier than they could be in an ordinary civil case. Pendent appellate jurisdiction is that doctrine.

So we can proceed to the merits, where we first observe that the district judge erred in dismissing Greenwell's claim on the basis of the Indiana medical-review statute. The statute governs claims under Indiana law (thus including diversity suits, *Jones v. Griffith*, 870 F.2d 1363, 1367-68 (7th Cir. 1989); *Hines v. Elkhart General Hospital*, 603 F.2d 646-47 (7th Cir. 1979)), not claims under federal law, as correctly noted in *Smith v. Indiana*, 904 F. Supp. 877, 879-80 (N.D. Ind. 1995). The judge should have dismissed the claim, all right, but on the merits.

There is an anterior question, however, of whether Greenwell successfully invoked federal admiralty jurisdiction. Her contention that Aztar violated its duty of

maintenance and cure by steering her to the doctors who operated on her establishes a maritime connection: she's a maritime employee and Aztar a maritime employer. At one time no more would have been necessary to place the case within the admiralty jurisdiction. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-34 (1995); *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866). But now a substantial relationship between the alleged tort and some traditional maritime activity must also be shown. *Sisson v. Ruby*, 497 U.S. 358, 364-67 (1990); *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673-75 (1982); *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1545 (11th Cir. 1994). That element is missing here, just as it would be if Greenwell were complaining that an employee of Aztar had broken into her house and poisoned her goldfish. Remember that it's not argued that Aztar knew or had reason to believe that the doctors were incompetent. The referral was innocent, and the alleged negligence of the doctors unforeseeable. *Jutzi-Johnson v. United States*, No. 00-2411, 2001 WL 1002736 at *2-4 (7th Cir. Sept. 4, 2001); *Beul v. ASSE International, Inc.*, 233 F.3d 441, 447 (7th Cir. 2000). In any event, neither in the goldfish case nor in our case is there enough of a maritime flavor to warrant trundling out a body of law designed to regulate maritime accidents, which is the distinction (between an adventitious and an organic relation to maritime activity) that explains why the Supreme Court added the "substantial relationship" test for determining whether there is admiralty jurisdiction. *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir. 1991); *In re Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 759-60 (9th Cir. 1986). The ordinary law

of medical malpractice is adequate to deal with the consequences of the operation by medical landlubbers on Greenwell's back for a condition that preexisted her maritime employment.

But jurisdiction depends on the facts as they appear when the complaint is filed. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Mullan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); *Chicago Typographical Union No. 16 v. Chicago Sun Times, Inc.*, 935 F.2d 1501, 1508 (7th Cir. 1991). Remember that Greenwell initially charged that she had been injured at work. That would have brought the case within range, at least, of the doctrine of maintenance and cure. When she dropped that charge, her claim of maintenance and cure evaporated, because the duty of cure is limited to injuries and illnesses that occur on the job. But it evaporated because of a failure of proof, not because of a failure of jurisdiction.

As for Greenwell's claim under the Jones Act, a claim within the federal-question jurisdiction of the district court, it too evaporated because of facts that emerged after the complaint was filed: that the doctors who operated on her were neither employees of the defendant nor acting on behalf of Aztar, thus eliminating any basis for vicarious liability, and that Aztar was not negligent in selecting them, thus eliminating any basis for holding it directly liable for the consequences of the operation on Greenwell's back. More fundamentally, the Jones Act, like the doctrine of maintenance and cure, *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 132-33 (1959), is limited to injuries that occur "in the course of [the seaman's] employment," 46 U.S.C. App. § 688(a), and Greenwell's did not.

Appendix A

The district judge mistakenly thought that Greenwell had a viable federal admiralty or Jones Act claim, just one that was premature. Let us now consider whether he was also mistaken in believing that Aztar could not implead the doctors under the admiralty impleader rule, Fed. R. Civ. P. 14(c), a rule "designed to expedite and consolidate admiralty actions by permitting a third- party plaintiff to demand judgment against a third-party defendant in favor of the plaintiff." *Texaco Exploration & Production Co. v. AmClyde Engineered Products Co.*, 243 F.3d 906, 910 (5th Cir. 2001). "In an admiralty suit, once a defendant impleads a third party in an effort to shift the burden of liability in whole or part from its own shoulders, and demands judgment in favor of the original plaintiff against that third party, the suit proceeds as if the original plaintiff had sued the third party." *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880, 882 (7th Cir. 1993). The peculiar urgency of many admiralty cases explains the rule. Admiralty proceedings typically are in rem, meaning that, through the fiction that the ship itself is the defendant, the ship is made security for the payment of any damages assessed against its owner; it might be too difficult to obtain jurisdiction over the owner, who might be thousands of miles away. Oliver Wendell Holmes, Jr., *The Common Law* 28 (1881). But with the right to seize the ship to secure the payment of damages comes a correlative obligation on the part of the court to expedite the case so that the ship isn't held in port indefinitely with its cargo rotting or otherwise going to waste, or is allowed to sail away beyond the court's reach.

The district judge's ground for refusing to permit Aztar to use Rule 14(c) was that Greenwell had failed to designate

her claim as an admiralty claim under Fed. R. Civ. P. 9(h). Rule 14(c) permits its special impleader procedure (as well as the special statute permitting certain interlocutory appeals in admiralty cases) only "when a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h)." The distinction is between a case being within the admiralty jurisdiction and the special admiralty procedures being applicable to the case.

So we go to Rule 9(h) and discover there that a pleading which sets forth a claim for relief that is within both the admiralty jurisdiction and some other grant of federal jurisdiction, as is the case here (where there is both a maintenance and cure claim and a Jones Act claim), "may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule 14(c) [and other special admiralty rules]." The purpose is to enable the plaintiff to notify his opponent and the court that he's invoking those rules, *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir. 1988); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252-54 (5th Cir. 1975), when, having another basis for federal jurisdiction, he could just rely on the ordinary civil rules. If he doesn't so indicate, by means of the statement or otherwise, *Wingerter v. Chester Quarry Co.*, *supra*, 185 F.3d at 665-68; *Foulk v. Donjon Marine Co.*, 144 F.3d 252, 256 (3d Cir. 1998); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 345 (5th Cir. 1991) (per curiam), the case proceeds under the ordinary civil rules. Since the plaintiff by thus forgoing the use of the admiralty rules surrenders whatever advantages he might derive from them, there is no reason to permit the defendant to invoke them either.

See *Foulk v. Donjon Marine Co., supra*, 144 F.3d at 257 n. 4; *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987 (5th Cir. 1978).

But all this is supremely unimportant in this case. For the significance of Rule 14(c) is that it permits the plaintiff to obtain relief directly from the third-party defendant, cutting out the middleman, the third- party plaintiff. If the third-party plaintiff, Aztar here, is not seeking to bow out, but is content to remain the middleman, paying the plaintiff if she obtains a judgment and then turning around and seeking reimbursement from the third-party defendants, rather than, as Rule 14(c) permits, substituting the third-party defendants (the doctors, in this case) for itself, it can use Rule 14(a), the ordinary impleader rule. Rule 14(c) drops out of the picture, see *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 913 (7th Cir. 1983), and with it any concern related to Rule 9(h), to which Rule 14(a) naturally does not refer. And Rule 14(a) can be used in admiralty suits as well as in ordinary federal civil suits. *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042, 1045 (5th Cir. 1985); *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1246 (9th Cir. 1979).

This point is academic too, however, because Greenwell's malpractice claim (maintenance and cure and Jones Act) has to be dismissed and with it goes any claim by the malpractice defendant (Aztar) against third parties. The remaining significance of the cross-appeal is that without it Aztar could not ask us to modify the judgment in its favor against Greenwell to make it a judgment on the merits dismissing her malpractice claim with prejudice rather than a procedural order dismissing it without prejudice.

Appendix A

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479-82 (1999); *Conover v. Lein*, 87 F.3d 905, 908 (7th Cir. 1996); *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1104 (7th Cir. 1990); *Engleson v. Burlington Northern R.R.*, 972 F.2d 1038, 1042 (9th Cir. 1992).

The district court's judgment is modified to place dismissal of the malpractice claim on the merits, and as so modified is affirmed. Because the claims over which the district court had original jurisdiction have thus dropped out before trial, the court will almost certainly want to dismiss the plaintiff's supplemental claims as well. See 28 U.S.C. § 1367(c)(3). But that is a judgment for that court to make in the first instance.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ENTRY ON THIRD-PARTY DEFENDANTS' MOTIONS TO DISMISS AND JUDGMENT DATED SEPTEMBER 21, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 98-0211-C-Y/H
Consolidated Case

JANET GREENWELL,

Plaintiff,

vs.

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Defendant,

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Plaintiff,

vs.

JANET GREENWELL,

Defendant,

Appendix B

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Third-Party Plaintiffs,

vs.

GREGORY J. LOOMIS, M.D. and
MATTHEW B. KERN, M.D.,

Third-Party Defendants.

ENTRY ON THIRD-PARTY DEFENDANTS' MOTIONS TO DISMISS

I. Introduction

This matter comes before the court on both third-party defendant, Gregory J. Loomis, M.D.'s ("Dr. Loomis") motion to dismiss and third-party defendant Matthew B. Kern, M.D.'s ("Dr. Kern") motion to dismiss for lack of jurisdiction and/or failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(6), respectively (collectively, "the motions"). FED. R. CIV. P. 12(b)(1), 12(b)(6).

This case was initiated when plaintiff Janet Greenwell ("Greenwell") filed an amended complaint against defendant, Aztar Indiana, Gaming Corporation d/b/a Aztar Casino ("Aztar"), alleging that Aztar's negligence and the negligence of its alleged agents, Dr. Loomis and Dr. Kern, resulted in injuries to Greenwell's back. In Aztar's answer to the complaint, Aztar denies that the doctors are its "agents."

Aztar subsequently filed a third-party complaint against the doctors for indemnification and contribution for any and all damages Aztar maybe liable for in the underlying litigation filed by Greenwell. The third-party defendant doctors now move to dismiss the third-party complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. For the reasons that follow, the court finds the doctors' motion to be well taken and it is hereby granted.

II. Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6), the court examines the sufficiency of the complaint, not the merits of the lawsuit. *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.Supp. 1399, 1406 (N.D. Ill. 1996) (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990)). A court should dismiss a complaint for failure to state a claim only if it appears to a legal certainty that the plaintiff would not be entitled to relief under any set of facts. *Hamlin v. Vaudenberg*, 95 F.3d 580 (7th Cir. 1996). In other words, a dismissal is proper only where the plaintiff can prove no set of facts that would entitle him to relief. *Mallett v. Wisconsin Div. of Vocational Rehabilitation*, 130 F.3d 1245, 1248 (7th Cir. 1997); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making its determination, the court shall accept all the facts in the complaint and supporting documents as true and draw all reasonable inferences in favor of the plaintiff. *Mallett*, 130 F.3d at 1248; *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996); *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605 (7th Cir. 1995).

Appendix B

III. Discussion

After reviewing the parties' briefs and reviewing the law, it appears that the only case on point is a Louisiana District Court case, *Harrison v. Glendal Drilling Co.*, 679 F. Supp. 1413. The court finds the *Harrison* case to be persuasive as it appears, from the published case law, that Louisiana courts hear the vast majority of maritime and admiralty claims and therefore are familiar and knowledgeable of the unwieldy field of admiralty law.

The *Harrison* case featured a scenario similar, to the one presented here: plaintiff was injured on a vessel and brought a Jones Act claim against his employer, the vessel owner; the defendant, employer asserted a third-party indemnification or contribution claim against the plaintiffs treating doctor; and the third-party defendant doctor moved to dismiss the third-party complaint for lack of subject matter jurisdiction, or alternatively, for failure to state a claim. Likewise, the *Harrison* third-party defendant doctor argued that the defendant had not complied with the state medical malpractice act and the defendant argued that their claim was for indemnity and contribution are maritime in nature and therefore set forth an independent basis for jurisdiction under admiralty law not state law. The *Harrison* court decision, which forms the basis of this court's decision, made the following conclusions in regard to federal subject matter jurisdiction and state medical malpractice law.

Appendix B

A. Subject Matter Jurisdiction Under Rule 14(c)

Rule 14(c)[1] permits a defendant to implead a third-party in cases where the initiating plaintiff asserted an admiralty claim pursuant to Rule 9(h)2. FED. R. CIV. P. 14(c) and 9(h). Thus, plaintiff must explicitly assert her claim as a Rule 9(h)[2]

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1. Rule 14(c) provides:

> (c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

FED. R. CIV. P. 14(c).

2. Rule 9(h) provides:

> These rules shall not be construed to extend, or limit the jurisdiction of the United States district courts or the

(Cont'd)

or must assert a claim where "admiralty jurisdiction is the *only* basis for federal subject matter jurisdiction" in order for the defendant to be permitted to bring in a third party via Rule 14(c). *Harrison*, 679 F.Supp. at 1417 (emphasis added). In other words, "[u]nder Rule 9(h), no specific 'identifying, statement' is necessary '[i]f the claim is cognizable only in admiralty.'" *Id.* at 1418 (alteration in original). But, if the plaintiff's complaint includes both an admiralty claim and some other basis for jurisdiction, then such an "identifying statement" is required to invoke a Rule 14(c) third-party claim. *Id.* The Fifth Circuit, the circuit which hears appeals from Louisiana District courts, has noted that when a plaintiff bases her claim on the Jones Act and general maritime law with a jury demand[3], but the plaintiff does not expressly identify her claim with a Rule 9(h) declaration, the claim is not properly identified as admiralty, therefore, the defendant cannot invoke Rule 14(c). *Lirette v. Popick Bros, Water Transport, Inc.*, 699 F.2d 725, 726 n.6 (5th Cir. 1983); *Smith v. Pinell*, 597 F.2d 994, 996-97 n.2 (5th Cir 1979) (citing *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374, 376-77 (D.Md. 1967).

(Cont'd)

> venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

FED. R. CIV. P. 82 .

3. Trials by jury are not available under admiralty law. *Harrison*, 679 F. Supp. at 1418.

Like the plaintiff in *Harrison*, Greenwell made a Jones Act claim providing the court with federal question jurisdiction; she demanded a trial by jury, which is not permitted in admiralty law, in her Amended Complaint; and she did not make a Rule 9(n) declaration. *Harrison*, 676 F.Supp. at 1419. Therefore, Greenwell's claim cannot be categorized as a Rule 9(h) claim. *Smith*, 597 F.2d at 996-96; *Harrison*, 679 F.Supp. at 1419; *Banks*, 43 F.R.D. at 376-77. Accordingly, Aztar cannot implead a third party via Rule 14(c) as Rule 14(c) may only be invoked when a plaintiff makes a Rule 9(h) claim. *Id.* Rule 14(c) does not provide jurisdiction for Aztar's third-party, complaint.

B. Supplemental Jurisdiction (28 U.S.C. § 1367)

Defendant Aztar argues, in the alternative, that the federal court has jurisdiction over its third-party claim under the doctrine of supplemental jurisdiction. 28 U.S.C. § 1367. The court will, therefore, address the applicability of supplemental jurisdiction in this case.

When independent jurisdiction, such as admiralty jurisdiction, does not exist, often supplemental jurisdiction is available over all claims so related to the claim over which there is original jurisdiction that they form part of the same case or controversy. 28 U.S.C. § 1367. Federal courts have discretion to decline jurisdiction over a state law claim, particularly if the state law claim predominates. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (concluding that ancillary jurisdiction is a "doctrine of discretion"; "Its justification lies in the considerations of judicial economy, convenience[,] and fairness to the litigants; if these

are not present, a federal court should hesitate to exercise jurisdiction over state claims."). For example, if a defendant makes third-party indemnification claims that are not independently cognizable under federal admiralty jurisdiction, then the third-party claim is not deemed to be a maritime claim and, therefore, it must be adjudicated under state law of contribution and indemnity, making it a state law claim. *Harrison*, 679 F.Supp. at 1421.

In order to invoke supplemental jurisdiction over state law claims, as a constitutional minimum, "the state and federal claims must derive from a common nucleus of operative facts." *Gibbs*, 383 U.S. at 726. As to be discussed below, the court finds that no common nucleus of operative facts exist between Greenwell's main claims and Aztar's third-party claims.

Again this court looks to the *Harrison* case for guidance. Like in Harrison, "[a]s regards quantum, there is arguably a common nucleus: both claims concern plaintiff's injury, [allegedly] sustained either as a result of negligence of the defendant[], or Dr. [Kem and Dr. Loomis], or both. . . . such a factual connection is not sufficient to satisfy the constitutional requirements necessary to invoke our ancillary jurisdiction." 676 F.Supp. 1423. The reasoning is that the federal and state claims have no factual similarities as the federal claim: "The disparate legal theories, Jones Act negligence and unseaworthiness on one hand, and medical malpractice on the other, reflect this lack of similarity in the operative facts before us." *Id.* at 1423.

Aztar pointed out in its brief that Harrison involved slightly different facts than the case at bar because the plaintiff and defendant settled the Jones Act claim and only the medical malpractice issue was before the court; however, Harrison did indicate that even if the federal claim had not settled, it still would refuse to hear the medical malpractice claim: "Permitting impleader and trying defendant[']s[] medical malpractice claim together with plaintiff s unrelated maritime claims would not promote judicial efficiency." *Id.* 1423.

As there is no sufficient common nucleus of facts between the state and federal law claims, this court declines to exercise jurisdiction over the state law claims. Therefore, both third-party defendants' motions to dismiss are granted. The parties should not be prejudiced with this dismissal as no extensive proceedings have commenced: there has been little discovery and what has been done can be used in a state case and there has been no trial in this case.

C. Failure to State a Claim/State Medical Malpractice Law

Even if this court exercised jurisdiction over the supplemental claims, the court would be acting prematurely as explained below.

Indiana law requires that prior to bringing an action against a health care provider in court, the claimant must present the proposed complaint before a medical review panel and the panel must render an opinion. IND. CODE 34-18-8-4. The only exceptions to this rule are: (1) when all parties including the

defendant doctor agree in writing to waive the medical review panel prerequisite to trial, (IND. CODE 34-18-8-5), and (2) when the plaintiff is claiming less than $15,000 in damages (IND. CODE 34-18-8-6). Neither exception has been satisfied in this case.

1. Third-Party Plaintiff Aztar's Complaint

In order for the court to rule on Aztar's indemnification claim, it would be called upon to determine the merits of a medical malpractice claim before a proper claim of medical malpractice is brought before a medical review panel pursuant to Indiana law. It would not be proper for this court, a federal court, to adjudicate a medical malpractice allegation by circumventing Indiana's medical malpractice statute.

Although the Indiana Department of Insurance, the agency that oversees the Indiana Medical Malpractice Act, found the Indiana Medical Malpractice Act inapplicable to the third-party complaint, the underlying complaint upon which the third-party complaint is based does set forth a medical-malpractice claim. The court has not been called upon to determine the validity of that claim. However, at this time, allowing the third-party complaint to proceed would be premature as it would require the court to determine whether the doctors committed medical malpractice. Until the proper channels are followed under the medical malpractice statutes, this court will not make a determination as to whether the doctors committed malpractice. Accordingly, third-party defendants Dr. Loomis' and Dr. Kern's motions to dismiss are **granted**.

Appendix B

2. Plaintiff Greenwell's Amended Complaint

It has come to the court's attention, through Dr. Kern's Brief in Support of the Motion to Dismiss, that Greenwell has in fact filed a complaint before the Indiana Department of Insurance and the review process has commenced. As Greenwell has not met her prerequisites to jurisdiction for her medical malpractice claim, the court **sua sponte dismisses without prejudice** Greenwell's medical malpractice claim, Count II of her Amended Complaint.

IV. Conclusion

For the reasons set forth above, the court finds that third-party, defendant Dr. Loomis' motion to dismiss and third-party defendant Dr. Kern's motion to dismiss are both hereby granted. In addition, the court declines to exercise supplemental jurisdiction over Greenwell's medical malpractice claims as detailed above; therefore, the court **sua sponte dismisses without prejudice** Count II (Malpractice) of Greenwell's Amended Complaint. The medical malpractice claim as well as Aztar's third-party contribution and/or indemnification claim should be heard in state court if the plaintiff so chooses to continue her claim after the medical review panel renders its opinion. This court will continue to exercise jurisdiction over Greenwell's Jones Act and related negligent representation and fraud claims against Aztar because cognizable independent federal jurisdiction exists as to these claims. There be no just reason for delay, the court directs entry of **final judgment to dismiss without prejudice** Greenwell's medical malpractice claim, Count II of her Amended Complaint.

Appendix B

It is so ordered this 21 day of September 2000.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Evansville Division

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 98-0211-C-Y/H
Consolidated Case

JANET GREENWELL,

Plaintiff,

vs.

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Defendant,

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Plaintiff,

vs.

JANET GREENWELL,

Defendant,

Appendix B

AZTAR INDIANA GAMING CORPORATION
d/b/a AZTAR CASINO,

Third-Party Plaintiffs,

vs.

GREGORY J. LOOMIS, M.D. and
MATTHEW B. KERN, M.D.,

Third-Party Defendants.

JUDGMENT

The court, having this day made its Entry and finding no just reason for delay,

IT IS THEREFORE ADJUDGED that third-party defendant Dr. Gregory J. Loomis' motion to dismiss and third-party defendant Dr. Matthew B. Kern's motion to dismiss are both **granted** and thus Aztar Indiana Gaming Corporation's third-party complaint against both Dr. Loomis and Dr. Kern is hereby **ORDERED DISMISSED**. In addition, it is **ADJUDGED, ORDERED AND DECREED** that Count II (malpractice claim) of plaintiff Janet Greenwell's amended complaint against defendant Aztar is now **DISMISSED WITHOUT PREJUDICE**, for lack of subject matter jurisdiction.

This is a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Appendix B

It is so ordered this 21 day of September 2000.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Evansville Division

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 16, 2001

Before

Hon. Thomas E. Fairchild, *Circuit Judge*

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

No. 00-3879

JANET GREENWELL,

Plaintiff-Appellant,

v.

AZTAR INDIANA GAMING CORPORATION, doing business as AZTAR CASINO,

Defendant-Third/Party Plaintiff-Appellee,

v.

MATTHEW B. KERN, Doctor and GREGORY J. LOOMIS,

Third/Party Defendants-Appellees.

Appendix C

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division

No. 98 C 211

Richard L. Young,
Judge.

ORDER

On October 18, 2001 plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.

Supreme Court, U.S.
FILED
MAR 27 2002
CLERK

(2)

No. 01-1244

IN THE
SUPREME COURT OF THE UNITED STATES

JANET GREENWELL,
Petitioner,

v.

AZTAR INDIANA GAMING CORPORATION,
doing business as Aztar Casino,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS TO DENY THE PETITION

Petitioner tries to grab this Court's attention by distorting both the nature of her claim and the Seventh Circuit's ruling. She argues she sustained an "aggravation" of a pre-existing back condition while at work on Respondent's vessel in June 1997 and sought to hold it liable for negligent surgery that doctors performed in August 1997 "pursuant to" Respondent's maritime duty of maintenance and cure. She further argues the Seventh Circuit's ruling that dismissed her claim was "unprecedented" and based on an erroneous assumption that she had to prove her "aggravation" at work in June 1997 was caused by some fault of Respondent before she could sue it for malpractice of her treating doctors.

In fact, (1) Petitioner's doctors did not treat her pursuant to any cure obligation owed by Respondent; they operated on a pre-existing back problem that she concealed from Respondent when she was hired so no cure duty ever arose, (2) her claim against Respondent relating to her surgery was not based on any allegation that she injured or aggravated her back at work, and (3) the Seventh Circuit did not dismiss her claim for the reasons she states and its holding was in no way novel or unprecedented or in conflict with any decision of this Court or any other circuit.

Petitioner initially did sue Respondent alleging she was injured at work on its vessel in June 1997 but she later dismissed that claim voluntarily. Her remaining claim that was examined by the Seventh Circuit simply alleged that two surgeons injured her in August 1997 by operating on her negligently, and that the surgeons were "selected" by Respondent so it should be vicariously liable for their actions under the Jones Act and general maritime law.

The Seventh Circuit recognized the well-established rule that if a crewmember is injured aboard ship, her employer can be liable for negligent medical care that worsens the injury. However, here the seaman sought to base Jones Act liability on an injury that private physicians supposedly inflicted on her long after she left the vessel, while treating a pre-existing condition that her pleadings did not allege was caused or aggravated by any occurrence aboard the ship. The Court properly held that federal subject matter jurisdiction did not exist in that situation.

The Seventh Circuit's opinion is in complete accord with previous holdings of this Court and other circuits. The case does not present issues of general importance. Review should be denied.

I.

PETITIONER MISSTATES KEY FACTS AND ALLEGATIONS OF HER OWN COMPLAINT

Petitioner had spondylolisthesis (a spine condition) that caused frequent episodes of low back pain sometimes radiating into her leg. She received chiropractic care for 20 years and twice was recommended to have corrective surgery to fuse her L5S1 vertebrae. Her problem was concealed from Respondent when she applied to load bags of coins into machines on its gaming vessel. She experienced one of her frequent ongoing episodes of back pain while walking on the ship in June 1997, worked on land for 2 months, and then underwent the same fusion surgery that had been recommended long before she was hired by Respondent.[1]

---

[1] Respondent did not select Petitioner's surgeons as she claims; they were recommended by her primary care doctor. It did not give her any form to sign about choosing doctors; apparently, her primary care physician gave her a form saying employees covered by state workers' compensation must defer to the employer's choice of doctor. This did not apply to vessel crewmembers like Petitioner who had a free choice of providers. Finally, Respondent did not deny Petitioner's request for a second opinion; it specifically told her she had the right to select her surgeons.

Respondent initially paid for Petitioner's surgery based on her report that she experienced back pain while on its vessel. It later learned her surgeons operated on a pre-existing concealed defect and filed a declaratory judgment action asking the district court to rule it was not liable to pay further benefits.[2]

Petitioner countersued Respondent in the district court. Her first complaint consisted of a single count, setting forth a traditional Jones Act claim alleging she was injured on the vessel in June 1997. Later, being unhappy with the result of her August 1997 surgery, she filed suit in state court against her surgeons seeking damages for their alleged malpractice. She then amended her federal complaint against Respondent to add the Count II claim that is the subject of her Petition.[3]

---

[2] Respondent did not pay for Petitioner's surgery "pursuant to its cure obligation" as alleged by her. An employer has no obligation to pay for treatment of conditions that are concealed from it as in this case. See p. 9 *infra*. Respondent would not have paid for the surgery if it had known of her concealment earlier.

[3] She also added state claims (Counts III and IV) asserting fraud against Respondent for alleging "forcing" her to see these particular surgeons. The Seventh Circuit did not consider those state claims and they are not a subject of the Petition.

Count II sought to hold Respondent vicariously liable for the alleged malpractice of her surgeons under the Jones Act. Count II was based solely on the allegation that her surgeons were chosen by Respondent and injured her in August 1997 (while she was allegedly still in the ship's service) by operating on her negligently. After adding her Count II claim, Petitioner voluntarily dismissed her original Count I claim alleging she was injured at work in June 1997.[4]

---

[4] Petitioner claims her dismissal of Count I "did not disavow" that her surgery was made necessary by an "aggravation or recurrence" of her back condition. (Petition p. 12). However, the only allegations in Count II were that Respondent "selected" her surgeons and while performing surgery in August 1997 they breached the "applicable standard of care," thereby injuring her. Count II contained no allegation that Petitioner sustained any injury or aggravation at work, or that her surgery in August 1997 was made necessary because of any injury or aggravation.

She also says she "did not drop the charge" that she was injured "in the service of the ship." Her pleadings did assert she was "in the service of the ship" but once she dismissed Count I the only claim to which that allegation attached was her Count II claim that she was injured during surgery in August 1997. She was not in the ship's service at that time. See p. 10 below.

The Seventh Circuit held that "had (Petitioner's) back pain been caused by an injury at work, as she originally charged" (in Count I) Respondent would be liable for any malpractice of her treating doctors under "standard" tort theory. 286 F.3d at 489. But her Count II claim sought to base liability only on the injury she alleged in August 1997. To hold Respondent liable for the surgeons' actions under the Jones Act on that count, Petitioner had to show (1) the surgeons were Respondent's "agents" when they injured her in August 1997, and (2) she was still in the "course of employ" as a crewmember at that time.

The Seventh Circuit held that Petitioner's surgeons were not Jones Act agents "acting on behalf of" Respondent when they operated on her pre-existing low back condition in August 1997. The Court also held she was no longer in the course of her employment as a vessel crewmember in August 1997. Thus, the Court held federal subject matter jurisdiction did not exist over the Count II claim. 268 F.3d at 492.[5]

---

[5] The ruling had nothing to do with whether or not Respondent was at "fault" for injuring Petitioner on the ship in June, which is the primary basis she asserts for error (Petition p. 10-12). The result was driven by her failure to assert any ship-board injury.

II.

THE COURT BELOW CORRECTLY HELD PETITIONER'S SURGEONS WERE NOT JONES ACT "AGENTS" OF RESPONDENT WHEN THEY OPERATED ON PETITIONER

The Jones Act incorporates the provisions of the FELA which render an employer liable for negligent actions of its officers, employees or "agents." 45 U.S.C. Sec. 51. Land-based doctors selected by the ship to treat conditions not of its making are generally not its Jones Act "agents." Kossick v. United Fruit Co., 336 U.S. 731, 733 (1961) (ship-owner held liable for negligence of a physician it chose to treat an illness based on its promise to the employee in that regard, but with the caveat "liability ... certainly cannot be found on the principles of *respondeat superior*"); Alholm v. American Steamship Company, 144 F.3d 1172, 1180 (8th Cir. 1998) ("a shipowner who is not responsible for the initial injury cannot be held vicariously liable for the negligence of an independent physician").

Non-employees can become "agents" whose negligence can be imputed to the employer under the Jones Act if they are "performing, under contract, operational activities" of the ship. See Hopson v. Texaco, Inc., 383 U.S. 262 (1966).

This Court stated in Hopson that a taxi driver was carrying out an "operational activity" of the ship while transporting two ill crewmen to the U.S. Consul because the ship had a "statutory duty" to take them there before sailing. The ship was held liable under the Jones Act for an injury the driver caused while carrying out the ship's duty.

Presumably, this is the rationale that has prompted some courts to hold that physicians arranged by employers to provide emergency treatment in foreign ports were their Jones Act "agents." See Central Gulf Steamship Corp. v. Sambula, 405 F.2d 291, 302 (5th Cir. 1968); De Centeno v. Gulf Fleet Crews, Inc., 798 F.2d 138 (5th Cir. 1986); Fitzgerald v. A.L. Burbank & Co., 451 F.2d 670, 679-680 (2nd Cir. 1971); Maritime Overseas Corp. v. United States, 433 F.Supp. 419 (N.D.Cal. 1977). Faced with an emergency, the ship has a duty to arrange prompt initial care. De Zon v. American President Lines, 318 U.S. 660 (1943). However, the surgeons that operated on Petitioner in August 1997 were not responding to any emergency aboard the ship. She departed the ship two months earlier and was working in Respondent's office on land.

Furthermore, Petitioner's surgery was for a pre-existing condition not of the ship's making that was concealed from Respondent. It is well-established that an employer has no duty to provide cure for concealed conditions of this kind. Sulentich v. Interlake Steamship Co., 257 F.2d 316, 320 (7th Cir. 1958), cert. den. 358 U.S. 885 (1958); McCorpen v. Central Gulf Steamship Corp., 396 F.2d 547, 548 (5th Cir. 1968), cert. den. 393 U.S. 894 (1968); Evans v. Blidbert Rothchild Co., 382 F.2d 637 (4th Cir. 1967); Wactor v. Spartan Transportation Corp., 27 F.3d 347 (8th Cir. 1994); Burkett v. Weyerhaeuser Steamship Co., 350 F.2d 826, 829 n.4 (9th Cir. 1965); Smith v. Apex Towing Co., 949 F.Supp. 667 (N.D. Ill. 1997). Because Respondent had no duty to cure Petitioner's pre-existing concealed condition, her surgeons were not fulfilling any duty Respondent owed her and thus were not acting as its agents when they operated on that condition in August 1997.[6]

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[6] Rannals v. Diamond Jo Casino, 265 F.3d 442 (6th Cir. 2001) cited by Petitioner held that a school might be the agent of the employer while carrying out vessel deck training that the employer paid for and required for advancement. However, that training activity, unlike the activities of Petitioner's surgeons, was clearly in the business interest of the employer.

III.

THE COURT BELOW CORRECTLY HELD PETITIONER WAS NO LONGER IN THE COURSE OF HER EMPLOY AS A VESSEL CREWMEMBER AT THE TIME OF SURGERY

The Jones Act provides a remedy only when a crewmember's injury occurs while "in the course of employment." 46 U.S.C. Sec. 688. Whether a seaman is in the course of employment "depends ... on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36 (1943).

Nearly any activity aboard ship will be considered in the course of a crewmember's employment, but activity on land will not unless it is in furtherance of the ship's business. Thus, crewmen injured ashore while on personal business are not covered by the Jones Act. See, e.g. Robair v. Penrod Drilling Corp., 720 So.2d 130 (La. App. 1998); Lee v. Miss. River Grain Elevator, 591 So.2d 1371 (La. App. 1991). Here Petitioner was off the ship working in Respondent's office for more than two months when she underwent her surgery in August 1997.

Moreover, her pre-existing condition was not of the ship's making, and she could have elected to have it treated surgically at any time. Her decision to undergo surgery while employed by Respondent, rather than earlier when the same surgery was recommended twice prior to her employment was a personal health matter unrelated to the ship's business. See Tinsley v. American President Lines, 8 Cal Rptr 2d 851, 1992 A.M.C. 2055 (Cal. App. 1992) (crewman who died from cigarette use was engaged in a personal lifetime habit, not business of the ship).

IV.

REVIEW BY THIS COURT IS UNWARRANTED

Subject matter jurisdiction may be raised at any point in a proceeding, including on appeal. It is appropriate for the court of appeals to review the record to the extent necessary to determine whether subject matter jurisdiction exists. Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986); United States v. Corrick, 298 U.S. 435, 440 (1936). The Seventh Circuit's holding that federal jurisdiction over Count II was absent was amply supported by the record and consistent with this Court's decisions in Kossick, Hopson and O'Donnell. See pp. 7-11 above.

The Seventh Circuit's conclusions, that Petitioner's surgeons were not Respondent's agents and she was no longer in the course of the vessel's employ at the time of surgery, do not even begin to rise to the level of a "generally important issue" that would justify review by this Court. Moreover, Petitioner already has and is pursuing an adequate state remedy against the surgeons she claims injured her. She does not need an overlapping federal remedy against Respondent for the alleged malpractice of those same surgeons, particularly when creation of such a federal remedy would require an untenable expansion of the present body of law governing Jones Act "agency" and scope of employ.

CONCLUSION

Respondent respectfully requests that the Petition be denied.

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